IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-986

BERNARD J. COLLINS and MARIAN COLLINS,
Petitioners,

vs.

THE RIDGE TOOL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit

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Your Petitioners, Bernard J. Collins and Marian Collins, pray that a Writ of Certiorari issue to review the Judgment of the Circuit Court of Appeals entered on September 15, 1975, which reversed a jury verdict and judgment in favor of the plaintiffs entered in the United States District Court for the Western District of Wisconsin on February 19, 1972.

OPINIONS BELOW

The Opinion of the United States District Court for the Western District of Wisconsin sustaining the jury verdict in favor of plaintiffs dated January 26, 1973, is not reported but is annexed as Appendix A.

The Opinion of the Seventh Circuit Court of Appeals is reported in 520 F. 2nd 591 (1975) without reference to the pendency or disposition of a Petition for Rehearing In Banc and is annexed as Appendix B.

On Petition for Rehearing In Banc, the Court of Appeals denied rehearing on October 14, 1975 by a vote of 7 to 3 without opinion. The Order Denying Rehearing is annexed as Appendix D.

JURISDICTION

The Opinion of the Court of Appeals was entered on August 13, 1975. A timely Petition for Rehearing In Banc was filed, which was denied by a vote of 7 to 3 without opinion. This Court has jurisdiction under 28 U.S.C., Section 1245 (1).

QUESTIONS PRESENTED

1. Whether an intra-circuit conflict was created by the divided decision (2-1) in this case with prior decisions of the same Court of Appeals construing Wisconsin negligence and comparative negligence law. If there was such a conflict created, did the 7-3 vote on Petition for Rehearing En Banc, without opinion, fail to resolve the conflict, contrary to prior decision of the Supreme Court?

2. Did the divided-decision of the Court of Appeals misapply and conflict with applicable Wisconsin negligence and comparative negligence law and applicable Wisconsin and federal law as to sufficiency of the evidence to support jury findings?

3. Whether a Court of Appeals may redetermine questions of fact determined by a properly instructed jury, in the face of

conflicting credible evidence, and absent any error by the trial court, without depriving litigant-petitioners of their Seventh Amendment rights to a jury trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT VII, Constitution of the United States, provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The Wisconsin Comparative Negligence statute created in 1931 is also involved, and at the time of the accident in question, it was section 895.045 Wis.Stats., reading as follows:

> "895.045 *Contributory Negligence; when bars recovery.* Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering."

STATEMENT OF THE CASE

Petitioner, Bernard Collins, was injured on November 28, 1967, while using a pipe threading machine manufactured by respondent, when his jacket became entangled in a rotating pipe at the front of the machine where the pipe protruded. As the

result of the injuries, his left arm was ultimately amputated. Petitioner, Marian Collins, is his wife.

The machine in question had a power switch located on the side of the machine, recessed and under a housing, towards the rear. Collins was not injured until about 10 seconds after he first became entangled and after the machine tipped over, during which time he could not reach the power-switch. There was evidence that if there had been a top or near top mounted switch, or a foot switch, he could have cut off the power and avoided injury. Experts testified that the machine was unreasonably dangerous as to design because of the location of the power-switch, that top or near-top mounted switches were feasible and were used by respondent's major competitors, and a foot-switch was feasible. Substantial expert testimony was presented at the trial by both parties as to whether the machine was or was not unreasonably dangerous and the negligence of the manufacturer with respect to warnings and instructions.

Petitioners commenced an action in the United States District Court for the Western District of Wisconsin under Wisconsin products liability law, claiming that the manufacturer was negligent because the machine was unreasonably dangerous as to design, failure to warn, and inadequate instructions.

On February 19, 1972, a unanimous 12 man jury returned a verdict in favor of plaintiffs for damages in the total sum of $247,737.75. The jury found defendant-manufacturer causally negligent and allocated 65% of the total negligence to it. The jury found Bernard Collins causally negligent and allocated 35% to him. Defendant's motions for judgment n.o.v. and for a new trial were denied by the trial court by an Opinion and Order dated January 26, 1973 (App. A), stating that the jury's findings were not against the weight of the evidence. (App. A, A-2).

In accordance with Wisconsin Comparative Negligence Law, the District Court entered judgment in favor of plaintiffs for $161,029.54.

Defendant made timely appeal to the Seventh Circuit Court of Appeals, and the case was argued in February, 1974. In a three-judge panel decision dated August 13, 1975, Indiana District Judge Grant, and Circuit Judge Pell, appointed from Indiana, weighed the conflicting testimony and concluded that defendant's product was safe. Senior Illinois District Judge William Campbell surveyed the conflicting evidence, and, in a strong dissent, concluded that the verdict should be affirmed.

Plaintiff made timely Petition for Rehearing In Banc, which was denied by a vote of 7 to 3 on October 14, 1975 without opinion.

Petitioners herein seek review of the reversal by the Seventh Circuit Court of Appeals of the Judgment in favor of plaintiffs.

REASONS FOR GRANTING THE WRIT

I. The Majority Decision Herein (2-1, Judges Grant, Pell, with Campbell Dissenting) Created an Intra-Circuit Conflict With Prior Decisions of the Seventh Circuit Court of Appeals in McPhee v. Corinth Machinery Co. (Judges Hastings, Fairchild and Campbell; See App. E and F), and Sievers v. Keebler Company (Judges Fairchild, Sprecher, and Reynolds; See App. G and H) Construing Wisconsin Negligence and Comparative Negligence Law in Products Liability Cases. The Intra-Circuit Conflict Was Not Resolved.

1. If an intra-circuit conflict was created, as will be shown, the Supreme Court has directed that the Court of Appeals should resolve the conflict. *Wisniewski v. U.S.*, 353 U.S. 901 (1957). Justice Harlan stated his view that such intramural conflicts should be avoided through later panels customarily deferring to decisions of prior panels. *"Manning the Dikes,"* 18th Annual Cardozo Lecture, p. 19.

On Petition for Rehearing in Banc herein, decided October 14, 1975, Chief Judge Fairchild, then Judge John Paul Stevens, and Judge William Campbell, who wrote the strong dissenting opinion in this case, voted for rehearing. It is a reasonable conclusion that these votes for rehearing implicitly indicated that the divided decision of the three-judge panel either (1) created an intra-circuit conflict with prior decisions of the *same* Court construing Wisconsin law, or (2) that the evidence was *not* such that the Court could say—as the majority did—*as a matter of law* that defendant-manufacturer was *not* negligent.

2. There was an intra-circuit conflict created by the majority decision in this case with prior decisions of the same Court construing Wisconsin law.

Uniquely, Wisconsin has had comparative negligence since 1931, while no other State in the Seventh Circuit has it (Laws, Wis. 1931, c. 242).

In *Collins v. Ridge Tool Co.*, as in *McPhee v. Corinth Machinery Co.* and *Sievers v. Keebler Company*—all arising in the U.S. District Court for the Western District of Wisconsin—the jury found plaintiff less negligent than the defendant-manufacturer, and the trial judge (James E. Doyle) sustained the jury findings as to causal and comparative negligence and granted judgment to plaintiffs.

In *Collins* the majority of the Court of Appeals overturned the verdict and judgment thereon, grounding the decision principally upon the basis that the danger of the rotating pipe was open and obvious, that Collins was fully cognizant of the hazards of his work (App. B-A 12) and he failed to exercise ordinary care to protect himself from a danger which he should have appreciated (App. B-A 13).

Although the foregoing reasoning of the majority relied upon assumption of risk principles, Wisconsin *abolished* assumption of risk in the leading case of *McConville v. State Farm Ins. Co.*, 15 Wis.2nd 374, 113 N.W.2nd 14 (1962), written by then-Wisconsin Supreme Court Justice Fairchild.

The majority decision was so unpalatable to Judge William Campbell that, in this strong dissent, after reviewing evidence to support the jury's and trial court's findings, he commented that the majority had substituted their evaluation of the record for the jury's, and "In my opinion the result reached by the majority improperly *and inexcusably* invades the province of the jury" (App. B, A-16) (Emphasis added).

The conflict of the majority decision with prior decisions construing Wisconsin products liability laws, is irrefutable when prior decisions of the same court are considered. In *McPhee v. Corinth Machinery Co.* (7th C.C.A. decision unpublished,

April 30, 1971, No. 18568, App. E), McPhee, a sawyer, lost both legs when he stepped on to a track ahead of a saw-carriage to dislodge the splinter from near the saw (App. E, A-20-21.) The *trial court found plaintiff causally negligent as a matter of law* in proceeding into the carriage area of the mill in the manner he did, but left to the jury the questions of negligence of the manufacturer, cause, and comparative negligence. The jury found causal negligence on the manufacturer, allocated 80% negligence to it, and 20% to plaintiff. The trial court sustained the verdict. On appeal, the Court of Appeals *affirmed*, and held that it "cannot be said as a matter of law that McPhee's causal negligence was equal to or greater than defendant's" (App. E, A-22). The reasons given by the majority *in Collins* for overturning the verdict, if applied to the facts in *McPhee*, would have resulted in *reversal* in *McPhee*. The noteworthy difference is that the Court of Appeals in McPhee did *not* exonerate the manufacturer because the danger was open and obvious to the plaintiff.

In *Sievers v. Keebler Company* (7th Cir., decision not published, Nov. 9, 1973, No. 69-C-155, reported affirmed 487 F. 2nd 1404, see App. G, H, I), plaintiff was injured in an industrial accident when his arm was caught in a machine manufactured by defendant. There was a verdict for plaintiff on comparative negligence, and the trial judge found that the findings were based upon substantial evidence, granting plaintiff judgment (App. I, A-41). The Court of Appeals, with two Wisconsin judges on the three-judge panel, *affirmed*, "adopted" the lower court decision (App. G, A-34), and, with respect to comparative negligence choice of law, cited Senior District Judge Campbell's opinion in *Elston v. Morgan*, 440 F.2nd 47, 50.

In *McPhee* and *Sievers*, as contrasted to the majority in *Collins*, the Court of Appeals did *not* exonerate the manufacturer and impose *all* the causal negligence on plaintiff upon the basis that plaintiff's familiarity with the hazard of an open and obvious danger required absolution of the manufacturer.

The conflict created by the majority decision herein is manifest, real, and devastatingly confiscatory. The collision of *that* decision *with Wisconsin law* and prior decisions of the *same* Court of Appeals is fortified by the fact that the decisions in *McPhee* and *Sievers* involved a Wisconsin trial judge and Court of Appeals panels including Wisconsin Judges. It was considered important in *Dick v. New York Life*, 359 U.S. 437, 447 (1958) by the Supreme Court, in reversing the Court of Appeals which had overturned the jury verdict, that "after all the evidence was in, the district judge, who was intimately concerned with the trial, and who has a first hand knowledge of the applicable state principles, believed that the case should go to the jury".

3. The 7-3 vote on Petition for Rehearing In Banc, denying rehearing without opinion, did *not* resolve the conflict discussed, contrary to directives in *Wisniewski v. U.S.*, supra. What distinguishes the situation in *Collins* from that in *McPhee* or *Sievers*? Each involved a workman at his employment injured by an open and known hazard. The principles to be applied to jury verdicts and trial court judgments in all three cases should have been the same with the same result. A divided vote without opinion does not resolve the conflict. No distinction has been shown.

The failure to resolve the manifest conflict, and the irreconcilability of the majority decision herein with the prior decisions, calls for intervention of the Supreme Court to correct a manifest injustice.

II. The Majority Decision Herein Collides With and Is Incompatible With Wisconsin Law and Applicable Federal Law.

1. The decision of the court below fails to give effect to applicable decisions of Wisconsin and federal courts as to the weight to be accorded jury findings and sufficiency of evidence to support the verdict.

The test of sufficiency of the evidence to support jury findings is substantially the same in Wisconsin as in the Seventh Circuit, viz., that where a jury verdict is attacked, the Court must consider the evidence and all inferences reasonably arising therefrom in the light most favorable to the prevailing party; and if there is any credible evidence, which, under any reasonable view, supports the jury's findings, the findings should not be set aside. *Bruno v. Biesecker*, 40 Wis.2nd 305, 312, 177 N.W.2nd 388 (1970); *Smith v. Uniroyal* (7th C.C.A.1970), 420 F.2nd 438, 440; *Dazenko v. Hunter Mach. Co.* (7th CCA 1968), 393 F. 2nd 287; *Sayen v. Rydzewski* (7th C.C.A. 1967), 387 F.2nd 815.

The Statement of the Case herein and the dissenting opinion of Judge Campbell in *Collins* (App. B, A-14-16) state evidentiary facts in support of the jury findings.

2. The decision of the Court below fails to give effect to applicable decisions of Wisconsin and the Seventh Circuit Court of Appeals as to changing jury answers or granting a directed verdict.

The majority in Collins *in effect* change the answers to the jury verdict, so that the manufacturer's negligence is redueed from 65% to 0 and Collins' causal negligence is increased to 100%. In Wisconsin, the rule governing when it is proper to change a jury's answer is that *only* if the record *is devoid of evidence* that would sustain the verdict, or if the evidence is incredible, is it within the province of the trial court or the Supreme Court to substitute its view of the evidence for that of the jury. *Johnson v. Sipe*, 263 Wis. 191, 56 N.W.2nd 852 (1952); *Maichle v. Jonovic*, 69 Wis.2nd 622, 626, 230 N.W.2nd 760 (1975). The comparison of negligence is peculiarly within the jury's province. *Davis v. Skille*, 12 Wis.2nd 482, 107 N.W.2nd 458 (1961).

In effect, the majority in *Collins* direct a verdict in favor of the manufacturer. In view of the evidence, this could *not* have been done by the trial court or the Court of Appeals under prior decisions of the Seventh Circuit. *5A, Moore's Fed.Prac. § 50.02, pp. 3320-3330.* The Seventh Circuit Rule, in diversity cases, is that *State* law controls as to when a verdict can be directed. *Etling v. Sander*, 447 F.2nd 593, 594 (1971). In Wisconsin "an issue should be taken from a jury *only* when the evidence gives rise to no dispute, or is so clear and convincing as reasonably to permit unbiased and impartial minds to come to but one conclusion." *Valiga v. Nat. Food.*, 58 Wis.2nd 232, 206 N.W. 2nd 377, 382 (1973).

The Statement of the Case and Judge Campbell's dissent include evidentiary basis compelling denial of a change of answers or direction of verdict in favor of defendant-manufacturer, rather than the result improperly accomplished by the majority.

3. The decision of the majority herein militates against applicable Wisconsin negligence and comparative negligence law in products liability cases.

The majority reversed because of Collins' knowledge of the dangers in the operation of the machine, the hazards of his work, and his failure to exercise ordinary care to protect himself from danger which he should have appreciated. *This is applying assumption of risk to completely bar the plaintiff.* That reasoning is repudiated in the decisions in *McPhee* and *Sievers*, supra, with Wisconsin judges on the appellate panels. Chief Judge Thomas Fairchild, then on the Wisconsin Supreme Court, wrote the decision in the leading case of *McConville v. State Farm Mutual*, 15 Wis.2nd 374, 113 N.W.2nd 14 (1962) which abolished assumption of risk.

In *McPhee*, supra, the same Judge Fairchild, then on the Seventh Circuit Court of Appeals, voted for affirmance of the

verdict for the plaintiff where the latter was found negligent as a matter of law in proceeding into a known danger. In *Collins* the majority reaches a *contrary result*.

Emphatically corroborating our contention that the majority erroneously applied assumption of risk principles *in conflict with Wisconsin law* is the comment by then-Wisconsin Supreme Court Justice Fairchild in *46 Marq.L.R. 1, 5 (1962)* that "In *McConville v. State Farm*, supra, and *Colson v. Rule*, 15 Wis.2nd 374, 113 N.W.2nd 14 (1962) the Court abolished the defense of assumption of risk at least where the assumption is implied from conduct. The Court pointed out that one's unreasonable exposure of himself to a particular hazard is negligence and *subject to the comparative negligence statute*".

The disharmony of the majority with Wisconsin law is further demonstrated by the Wisconsin decisions that "conduct formerly called assumption of risk is also subject to the *same rule of comparison* as any *other* type of negligence; that *McConville* (abolishing assumption of risk) did *more* than change labels." *Bishop v. Johnson*, 36 Wis.2nd 64, 152 NW 2nd 887 (1967).

Wisconsin law following *McConville v. State Farm*, supra, said that an "obvious reason " why McConville abolished assumption of risk "was to extend the benefit of our comparative negligence statute to the plaintiff". *Dippel v. Sciano*, 37 Wis.2nd 443, 461, 155 N.W.2nd 55 (1967).

Conflictingly, the majority in *Collins* applied assumption of risk reasoning *to deprive, rather than give*, Collins the "*benefit* of our comparative negligence statute."

Further conflicting with Wisconsin law, the majority erroneously construed the "duty" of the manufacturer to depend on the facts of the injury-causing event and the conduct and experience of the plaintiff. *This is not the law of Wisconsin.* The duty

of defendant-manufacturer in Wisconsin is *separately* prescribed by law and is the *same* as to all users of products—even non-users. *Howes v. Hansen*, 56 Wis.2nd 247, 201 N.W.2nd 825 (1972).

Insofar as the majority was concerned, the abolition of assumption of risk by *McConville* and the subjecting of such conduct to comparative negligence, as provided by *Dippel*, did *not* change Wisconsin law. The majority decision is at war with Wisconsin law.

Wisconsin law and Federal law in the Seventh Circuit required that the jury verdict and judgment of the trial court be affirmed if there was any credible evidence to support the jury's findings, and the evidence has to be construed most favorably in support of the verdict. There was such evidence. The majority of the Court did *not* construe the evidence in conformity with these rules.

If Wisconsin law had been correctly applied *in Collins*, and if Wisconsin law had been applied consistent with prior decisions of the Seventh Circuit Court of Appeals construing the same law, an affirmance of the jury verdict and judgment of the trial court was required. Petitioners are the victims of inconsistency and the misapplication of Wisconsin law by the majority.

III. **The Redetermination of Facts by the Majority, in Conflict With Applicable Wisconsin Law on Negligence and Comparative Negligence, in Conflict With Prior Decisions of the Seventh Circuit Court of Appeals Construing the Same Law, in Conflict With Wisconsin and Federal Law as to Sufficiency of Evidence to Support Jury Findings, in the Face of Supporting Credible Evidence, Without Error Committed by the Trial Court, Deprives Collins of Their Seventh Amendment Rights to a Jury Trial.**

The discussions in preceding sections of this Petition support the contentions concerning the conflicts of the majority in the respects above mentioned.

The majority finds no error in admission of evidence, no error in jury instructions, no error committed by the trial court, no misconduct by the jury, but undertook a *de novo* review of the evidence and found "error in the verdict."

A reading of the majority and dissenting opinions of the three judge panel of the Court of Appeals in this case leaves no doubt but what there was substantial conflict in the evidence in this case, mostly in the form of competing expert opinions as to the safety of the product which injured the plaintiff. Although this Court has held that the Court of Appeals may enter judgment n.o.v. on behalf of a verdict loser (*Neely v. Eby Construction Co.*) 386 U.S. 317 (1967), no decision of this Court has permitted an appeals court a *lesser* standard of review of a jury verdict than that imposed on the trial court.

The majority did not disclose precisely whether it intended to apply a standard of review based upon state or federal law, but rather used terms such as "We are convinced," "Accordingly, it is our opinion," and "since we find." (App. B, A. 13-14) The trial court, on the other hand, in affirming the

verdict applied the following standard as to the defendant motion for judgment n.o.v.:

> "For the purpose of this motion, I must determine whether the evidence along with all of the inferences to be reasonably drawn therefrom, when viewed in the light most favorable to the plaintiff, is such that reasonable persons in a fair and impartial exercise of their judgment might reach different answers to questions 1 and 2 of the special verdict . . ."
>
> (p. 1, App. A.)

It is apparent that the panel of the Court of Appeals applied a standard of review which gave *less* weight to the verdict and the evidence than that applied by the trial court.

In *A. & G. Stevedores v. Ellerman Lines*, 369 U.S. 355, 359 (1962) this court pointed out that:

> ". . . *neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them.* For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.' " (Emphasis supplied)

It is respectfully submitted that the test applied by the *trial* court in this case is a necessary "minimum" test of the sufficiency of the evidence under the Seventh Amendment. The test of the majority, couched in terms of being "convinced" or of "finding" facts from the evidence presented to the jury, is a test of a jury verdict *not* "according to the rules of the common law." The test of the majority is particularly inadequate where no error is found in the admission of evidence, jury instructions, conduct of counsel, or conduct of the jury.

The necessity for determining a reasonable minimum standard for review of evidence in diversity cases is pointedly shown by examining what "reasonable persons in a fair and impartial exercise of their judgment" have concluded concerning the evidence in this case. Twelve properly selected, properly-instructed jurors, the trial judge, and a senior district judge found evidence to support the verdict. A district judge and an appellate court judge, viewed the evidence favorably to the defendant. On motion for rehearing, two more appellate judges joined the plaintiffs' view of the evidence, but the defendant still prevailed. The result in this case is precisely the wrong which the Seventh Amendment was intended to prevent.

If substantial and uniform deference is not accorded the verdicts of juries in error-free trials in diversity cases, then the rights accorded to litigants by the Seventh Amendment are severely eroded. These rights of Collins were demolished by the majority decision.

This Court has noted on two occasions the necessity of considering in a definitive fashion whether a state or federal standard should be applied in diversity cases in reviewing the sufficiency of evidence. *Dick v. New York Life Ins. Co.*, 79 S. Ct. 921, 359 U. S. 437, 3 L.Ed. 2d 935 (1959); *Mercer v. Theriot*, 377 U. S. 152, 156 (1964). This undecided issue could be resolved by the Court in one of at least two ways. (1) The Court could decide whether a state or federal standard should be uniformly applied, or (2) the Court could determine a standard of review which meets the requisites of the Seventh Amendment in all cases. Petitioners submit that the standard of review applied by the *District Court* in this case is a necessary minimum standard which the Court should determine must be applied in all diversity cases—whether in the name of state or federal law. In the case at bar the Court of Appeals has found *no error whatsoever on the part of the trial court* and has isolated for de

termination the peculiar issue relating to the review of evidence in a diversity case. The review by the majority is incompatible with any permissible authority under Wisconsin Law or current law in the Seventh Circuit.

Under the circumstances of this case, the majority decision in the Court below violates Collins' Seventh Amendment rights.

CONCLUSION

Certiorari is warranted and should be granted in this case for the following reasons:

1. The decision of the Court of Appeals creates and fails to resolve substantial conflict with prior decisions of the Seventh Circuit in construing Wisconsin products liability and comparative negligence law.

2. The decision of the Court of Appeals manifestly conflicts with applicable Wisconsin products liability and comparative negligence law.

3. The decision of the Court of Appeals ignored applicable Federal standards applicable on appeal under law of the Seventh Circuit, Wisconsin law, and the Seventh Amendment.

4. The lower Court's test of the sufficiency of the evidence to support the jury verdict and judgment raises the unresolved problem of whether, in diversity cases, the state or the federal test of sufficiency of the evidence applies, and what the minimum standard of the applicable test should be.

5. In the interests of justice, and in view of applicable Wisconsin and Federal law in the Seventh Circuit, the decision of the

Court below should not be permitted to stand, and the judgment of the trial court should ultimately be reinstated.

Respectfully submitted

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APPENDIX

APPENDIX A

In the United States District Court
For the Western District of Wisconsin

Bernard J. Collins and Marian Collins,
Plaintiffs,
v.
The Ridge Tool Company, a foreign corporation,
Defendant.
} 69-C-216

OPINION AND ORDER

Following the return of a special verdict by a jury herein, and the entry of judgment pursuant to the verdict, defendant has moved for judgment notwithstanding the verdict and, in the alternative, for a new trial.

Motion for Judgment Notwithstanding the Verdict

This motion is made on the grounds: (1) that there is no credible evidence that the defendant was negligent, that the product was unreasonably dangerous to the user, that the operator was not provided instruction by the defendant and was not fully knowledgeable as to the proper operation procedures and positions, and that the hazard associated with the rotating pipe was not open and obvious and known to the plaintiff so as to render the absence of a specific warning meaningless; and (2) that as a matter of law the causal negligence of the plaintiff was greater than the causal negligence of the defendant.

For the purpose of this motion, I must determine whether the evidence, along with all of the inferences to be reasonably drawn therefrom, when viewed in the light most favorable to the plaintiff, is such that reasonable persons in a fair and impartial exercise of their judgment might reach different answers to questions 1 and 2 of the special verdict, and different answers to whether the causal negligence of the plaintiff was greater than the causal negligence of the defendant (question 5). Here the evidence was clearly not sufficient to require reasonable persons to answer those questions only in the manner urged by the defendant.

Motion for a New Trial

Defendant's alternative motion is made on six grounds, three of which are that the verdict is against the weight of the evidence, that the amount of the damages is excessive, and that the interests of justice require a new trial. Unless and except as a new trial may be required on any of the other three grounds, discussed below, I am aware of no interest of justice which requires a new trial. The injuries sustained by the plaintiff Bernard Collins were severe; the resulting injury to the plaintiff Marian Collins was genuine; the sum awarded for loss of earning capacity was not unreasonable in view of the nature and extent of the plaintiff's injury and in view of his age, and in the verdict in this respect the jury demonstrated that it could not accept the glib estimate embodied in the bland, condescending, and simplistic testimony of plaintiff's expert; the amounts entered by the jury in answer to questions 6(a) and 6(b) were not unreasonably high. In determining whether the jury's answers to any of the questions in the special verdict were against the weight of the evidence, I am not simply to substitute my responses for those of the jury; in the exercise of my discretion, I cannot say that my responses differed from the jury's in such degree that I can hold its answers to be against the weight of the evidence.

I will take up in sequence the remaining three grounds of the motion for new trial.

Defendant contends that it was error to receive certain evidence, over its objection. The disputed evidence related to: a "bossed" switch on a Ridgid 700; a foot switch improvised by the witness Nachreiner; and certain opinion testimony. There was no unfairness in permitting testimony concerning the Ridgid 700 simply as an illustration of the use of a boss to guard a switch button, and the testimony and demonstrations concerning the footswitch, all the subject of lively cross-examination, also fairly raised the question of a workable alternative to defendant's design as to switch location. The opinion testimony of the witnesses Nachreiner, Bollinger, and Skogen was well within permissible limits; Nachreiner's practical experience was considerable; the limits on Bollinger's and Skogen's competence, and the infirmities in the bases for some of their opinions were adequately explored; the jury's award for reduced earning capacity is reasonable enough to indicate that defendant was not prejudiced by the testimony of George Delehanty.

I do not understand the basis of defendant's motion with respect to the testimony of the witness Weibel concerning the refusal to receive opinion evidence of the witness Weibel regarding the "normal" operating positions of an operator during the cutting operation. For a witness to testify how the machine has been normally used by those who have been operating in the trade it would be necessary to establish the necessary foundation in terms of opportunity widely to observe such operations.

I consider that the grounds for the defendant's motion which relate to instructions are serious grounds deserving of careful scrutiny and consideration. I accorded these contentions such scrutiny and consideration during the discussions with counsel while the instructions were being formulated. I have carefully reviewed these questions in considering the post-trial motions. I am not persuaded that the instructions were erroneous or prejudicial to the defendant, and I believe the trial record adequately reveals the bases of my views.

Order

Upon the basis of the entire record herein, it is ordered that defendant's motion for judgment notwithstanding the verdict and defendant's motion for a new trial are hereby denied.

Entered this 26th day of January, 1973.

By the Court

/s/ JAMES E. DOYLE
District Judge

APPENDIX B

520 F.2nd 591 (1975)

***Note: Reported opinion makes no reference to Petition for Rehearing In Banc or Decision Thereon.

In the
United States Court of Appeals
For the Seventh Circuit

No. 73-1337

Bernard J. Collins and Marian Collins,

Plaintiffs-Appellees,

vs.

The Ridge Tool Company,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 69-C-216
James E. Doyle, *Judge*

Argued February 19, 1974—Decided August 13, 1975

Before Pell, *Circuit Judge;* Campbell, *Senior District Judge;** and Grant, *Senior District Judge.***

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* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

** Senior District Judge Robert A. Grant of the Northern District of Indiana is sitting by designation.

Grant, *Senior District Judge*. Appellees Bernard J. Collins and Marian Collins brought the present action against appellant, The Ridge Tool Company, for injuries sustained by Bernard Collins while he was using a Rigid 300 Power-Drive designed, manufactured, and sold by appellant. The Rigid 300 is a portable machine used by plumbers for cutting, reaming, and threading pipe. When the machine is used to cut pipe in accordance with the instructions set forth in the Operator's Manual, the pipe is inserted into the unit, the speed chuck (a securing clamp) and centering devices are tightened, and the cutter is applied to the pipe and its blade tightened until it contacts the pipe. Then the power is turned on, and the cutter blade is tightened until the cut is completed. Appellee, a master plumber, had used the Rigid 300 and machines similar thereto on many occasions prior to the accident. Nevertheless, on 28 November 1967, while appellee was using the machine to cut a 12-inch section of pipe, the front of his jacket became entangled in the rotating pipe. The machine toppled over, and appellee sustained severe injuries to his left arm. Subsequently, the arm had to be amputated immediately above the elbow.

In the district court, the jury found both appellant and appellee causally negligent; attributed 65% of the negligence to appellant and 35% to appellee; and assessed total damages in the amount of $247,737.75. After the damages were reduced to reflect the contributory negligence of appellee, judgment was entered against appellant in the amount of $161,029.54 together with costs and interest. Thereafter, an order denying appellant's Motion for Judgment Notwithstanding the Verdict or for a New Trial was entered. Appellant thereupon instituted the present appeal from the judgment and order in the court below.

In support of its position on appeal, appellant Ridge Tool argues initially that it breached no duty to appellee as a matter of law. In this regard, appellant claims that it cannot be held liable where the danger associated with the Rigid 300 was open

and obvious and since the possibility of injury from contact with a moving part of the machine was readily apparent to appellee, a man who had owned and operated the machine "hundreds of times". Further, the fact that the dangers inherent in the Rigid 300 were open and obvious, argues appellant, rendered unnecessary the giving of any warning to the user. Finally, with respect to the issue of appellant's duty to appellee, it is argued that the alleged lack of written instructions as to how to operate the Rigid 300 cannot support a finding of liability, given appellee's past experience in using the Rigid 300 as well as his knowledge of its operating characteristics.

Appellant also charges that the district court erred in admitting expert testimony that the Rigid 300 was unreasonably dangerous; in admitting testimony with respect to the design features of the Rigid 700 and a foot switch device; and in its instructions to the jury.

Finally, appellant asserts that there is no credible evidence which supports the jury's apportionment of negligence. In this regard, it is argued that appellee's negligence was clearly equal to or greater than any negligence of appellant; therefore, the jury's verdict, including the individual damage awards, is so excessive as to be unconscionable. Accordingly, appellant urges this Court, for the above-stated reasons, to set aside the verdict and judgment in the court below or, in the alternative, order a new trial.

In response, appellees Bernard and Marian Collins claim that the Rigid 300 was unreasonably dangerous by reason of its design, because the power switch was located in a place where it was inaccessible to anyone operating the machine from the front or left front. Additionally, they contend that under Wisconsin products liability law, the defense of "open and obvious danger" is not available to appellant as a complete bar to recovery. Rather, appellees argue that the conduct on the part of a user of an unreasonably dangerous product is subject to a compara-

tive negligence standard. It is asserted that the doctrine of comparative fault takes into account defenses which would otherwise be absolute and treats them for the purpose of comparison under the name of negligence. In any event, appellees maintain that even if the "open and obvious danger" defense does apply, the inaccessibility of the power switch on the Rigid 300 was a dangerous condition that was not open and obvious to appellee. Rather, it was a condition, says appellee, which most users would not discover, and a danger which most users would not appreciate until they were already entangled in the rotating pipe. Further, because of the inaccessibility of the switch, appellees contend that the potential operator should have been warned to stand near the switch while running the machine. At the very least, appellees argue that appellant had an obligation to provide full and adequate instructions to potential users of the Rigid 300 regarding its safe operation.

In further response to appellant's position in this appeal, appellees contend that the trial court did not err in admitting expert testimony that the Rigid 300 was unreasonably dangerous; in admitting testimony relating to the Rigid 700 and the foot pedal device; and in its instructions to the jury.

Finally, appellees emphasize that the jury's allocation of causal comparative negligence is supported by the evidence. In this respect, it is urged that the damage awards were neither excessive nor in disregard of applicable law, but rather accurately reflected and compensated appellees for the loss which they sustained. Accordingly, appellees ask this Court to affirm the verdict and judgment entered in the court below.

It is axiomatic in products liability law, and appellant concedes, that a manufacturer is legally bound to design and build products which are reasonably fit and safe for the purpose for which they are intended. Nevertheless, it is equally clear that a manufacturer is under no duty to produce accident or foolproof products. *Zahora v. Harnischfeger Corporation*, 404

F.2d 172, 175 (7th Cir. 1968). Neither is the manufacturer an insurer that its product is incapable of producing injury. *Garrison v. Rohm and Haas Company*, 492 F.2d 346, 351 (6th Cir. 1974). In determining the reasonableness of design, certain factors which should be examined include: 1) conformity of defendant's design to the practices of other manufacturers in its industry at the time of manufacture; 2) the open and obvious nature of the alleged danger; and 3) the extent of the claimant's use of the very product alleged to have caused the injury and the period of time involved in such use by the claimant and others prior to the injury without any harmful incident. *Ward v. Hobart Manufacturing Company*, 450 F.2d 1176, 1182 (5th Cir. 1971). Other relevant factors, which are practical or economic in nature, include: 4) the ability of the manufacturer to eliminate danger without impairing the product's usefulness or making it unduly expensive; and 5) the relative likelihood of injury resulting from the product's present design. *Magnuson v. Rupp Manufacturing, Inc.*, 171 N.W.2d 201, 208 (1969). As to the latter two factors, although we realize, upon our careful review of the record, that there was ample testimony in the court below by appellee's experts that the switch on the Rigid 300 could have been relocated, or that a different switching system could have been incorporated into its design,there was also testimony elicited which indicated that there were no other machines similar to the Rigid 300 utilizing emergency control systems and that the incorporation of such a cut-off device would be costly as well as affect the utility of the product. While we believe that this testimony as to the feasibility or non-feasibility of installing alternative switching systems or relocating the switch on the Rigid 300 is indeed relevant to, and will not be overlooked in arriving at our decision in the present appeal, we are inclined to attach more significance to, and thus we now focus our attention upon, the issue which we believe, because of the particular circumstances involved herein, will ultimately determine the outcome of the instant appeal; and that issue involves the alleged duty on the part of appellant herein to appellee in light of the

argument that the danger to appellee, a master plumber with many years experience, was open and obvious.

Appellant would have us follow what is generally known as the "open and obvious" rule enunciated in *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802, 804 (1950), and the equivalent of which this Court applied in *Posey v. Clark Equipment Company*, 409 F.2d 560 (7th Cir. 1969). The "open and obvious" rule, simply stated, holds that a manufacturer of a product is under no duty to guard against or give notice of dangers which are obvious or patent to the user. *Campo, supra*, 95 N.E.2d at 804. In effect, *Campo* stands for the broad proposition that liability will not be imposed on the manufacturer unless there is a "latent defect", irrespective of whether or not the injury was incurred by accidental or voluntary contact. *Dyson v. General Motors Corporation*, 298 F.Supp. 1064, 1072 (E.D.Pa. 1969). Although this doctrine has received wide support and has been applied in many jurisdictions,[1] including this Circuit,[2] there is an indication that the more recent trend of the cases evidences an increasing dissatisfaction with the *Campo* doctrine and opts instead in favor of an approach which reflects an effort to "discourage misdesign rather than encouraging it in its obvious form", *Palmer v. Massey-Ferguson, Inc.*, 3 Wash.App. 508, 476 P.2d 713, 719 (1970), and which further recognizes that "manufacturers ought to make safer not more dangerous products." *Dorsey v. Yoder Company*, 331 F.Supp. 753, 759 (E.D.Pa.

[1] *Stevens v. Durbin-Durco, Inc.*, 377 S.W.2d 343 (Mo., 1964); *Parker v. Heasler Plumbing & Heating Co.*, 388 P.2d 516 (Wyo., 1964); *Bradshaw v. Blystone Equip. Co. of Nevada*, 79 Nev. 441, 386 P.2d 396 (1963); *Tyson v. Long Mfg. Co.*, 249 N.C. 557, 107 S.E.2d 170 (1959); *Standard Conveyor Co. v. Scott*, 221 F.2d 460 (8th Cir. 1955); *Jamieson v. Woodward & Lothrop*, 101 U.S.App. D.C. 32, 247 F.2d 23 (1957); *Brown v. General Motors Corp.*, 355 F.2d 814 (8th Cir. 1966); *Bowman v. Kaufman*, 387 F.2d 582 (2nd Cir. 1967).

[2] *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966); *Neusus v. Sponholtz*, 369 F.2d 259 (7th Cir. 1966).

1971). These and other authorities take the view, in general, that no distinction should be made between products whose dangers are obvious or latent to the user, in order to discourage misdesign even in its obvious form. Other commentators have said that the *Campo* doctrine should apply only when plaintiff appreciates the danger inherent in the product. 1 Frumer & Friedman, *Products Liability* § 702, p. 117 (1974).

Although we take notice of the fact that this Court has in the past aligned itself with the so-called *Campo* rule, *Posey, supra*, 409 F.2d at 563-564 and *Downey v. Moore's Time-Saving Equipment, Inc.*, 432 F.2d 1088, 1092 (7th Cir. 1970), we would be remiss if we failed to note that both of those cases were based upon and involved the application of Indiana law. In the present appeal, nevertheless, it is undisputed that Wisconsin law governs the issues at bar. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Accordingly, we are constrained to determine the issues herein presented as we believe the Wisconsin courts would under the circumstances.

The leading Wisconsin case in the area of products liability appears to be *Dippel v. Sciano*, 37 Wis.2d 443, 155 N.W.2d 55 (1967), interpreting the earlier holding of *McConville v. State Farm Mutual Automobile Ins. Co.*, 15 Wis.2d 374, 113 N.W.2d 14 (1962). In *McConville*, the Wisconsin Supreme Court stated that the defense of assumption of risk should be treated as contributory negligence. *Dippel*, in turn, explained that the reason for this was to subject the conduct of the user of an unreasonably dangerous product to a comparative negligence standard. Appellee argues, then, that his duty "to use ordinary care to protect himself from known or readily apparent danger", *Dippel, supra*, 155 N.W.2d at 63, defines his duty with respect to open and obvious hazards, and that any negligence on his part should be, and properly was in the trial court, treated as an item of contributory negligence for purposes of comparison with the causal negligence or fault of the appellant under Wis. Stats. §

895.045 (1969). On the other hand, appellant urges us to follow *Yaun v. Allis-Chalmers Mfg. Co.*, 253 Wis. 558, 34 N.W.2d 853 (1948), as standing for an adoption by the Wisconsin Supreme Court of the open and obvious rule concerning products liability.

While we have no quarrel with appellee's interpretation of the law of Wisconsin as it applies to this case, and while we must not in applying that law to the case at bar subscribe to the *Campo* doctrine in its pure sense, we are of the opinion that the question of whether a danger is open and obvious to a user of a particular instrumentality is not a matter which should be determined in a vacuum. Rather, the unique facts of each case should bear on the question, and thus, in our opinion, includes the status, intelligence, and more importantly, the training of the particular user involved. In this regard, we believe that the facts of the instant case require us to consider additional factors, some of which have been noted above, in determining whether, under the circumstances of the instant case, the dangers associated with the Rigid 300 were indeed open and obvious to the appellee, Bernard Collins. The first of these factors which we consider to be particularly applicable to the facts of this case is "the extent of [appellee's] use of the [Rigid 300, the product] alleged to have caused [his] injury and the period of time involved in such use by [appellee] . . . prior to the injury without any harmful incident." *Ward, supra*, 450 F.2d at 1182. Second, we are persuaded that a manufacturer's duty to impart information as to the safe use of its product, whether it be by warnings or instructions, is significantly minimized where the user is a member of a particular trade or profession with regard to a danger that is generally known to that trade or profession. *Littlehale v. E. I. duPont de Nemours & Co.*, 380 F.2d 274 (2nd Cir. 1967); *Lockett v. General Electric Company*, 376 F.Supp. 1201, 1209 (E.D.Pa. 1974). Certainly the intended user's training and experience must be considered where the issue of a manufacturer's duty to guard against

and apprise of danger is concerned. *Helene Curtis Industries, Inc. v. Pruitt*, 385 F.2d 841, 858 (5th Cir. 1967).

With regard to the first factor, it is undisputed that appellee herein had, at the time of the accident, "owned five Rigid 300's", and prior thereto had accomplished a pipe operation with the Rigid 300 "hundreds of times". Appellee further testified that he appreciated and was fully aware of the danger of being entangled in the pipe while it was turning in the machine. As to the second factor, it is uncontested that appellee was a master plumber for several years prior to the date of the accident. Therefore, he had many years of training and experience in using and operating the machinery indigenous to his business, and had attained enough expertise, in fact, to have risen to the status of a master plumber. We are convinced, then, that appellee was a professional in his trade who, because of past experience, had to be fully cognizant of the hazards involved in his work. Accordingly, it is our opinion that although there were no emergency switches or warnings directly on the Rigid 300 itself, and even though there were no warnings or instructions in the Operator's Manual which was furnished with the unit telling the operator where to stand while cutting pipe (except for a photograph which depicts an operator in the process of cutting pipe), we have no alternative but to conclude, on the basis of our review of the record herein, that there is no evidentiary basis, given appellee's knowledge and background, for finding that appellee's injuries resulted from the negligence of the manufacturer. In this regard, we hold that appellee's injury did not result from any inherent defect in the Rigid 300 either in design or faulty construction. Rather, it is inescapable that the unfortunate injury to appellee, which we indeed acknowledge as grave, in our opinion resulted solely from a careless mistake in operation. We have no doubt, therefore, that appellee failed to use ordinary care to protect himself from a danger which he, of all people, should have readily appreciated. *Dippel, supra*, 155 N.W.2d at 63. Accordingly, since we find that the

Rigid 300 was reasonably safe for its intended use, taking into account the training and experience of the persons for whose use the machine was intended, and that appellee's negligence was the sole cause of the injuries sustained, we find error in the verdict in the court below. We conclude, therefore, because of our holding that the sole cause of the accident was the negligence of appellee Bernard Collins, that it is unnecessary to address the other issues which the appellee has raised before this Court.

Accordingly, the judgment of the district court is Reversed and the cause is Remanded for the entry of judgment in favor of appellant, The Ridge Tool Company.

CAMPBELL, dissenting. I would have affirmed the judgment of the district court "from the bench" following oral argument, in view of the clear absence of any issue of law upon which reversal might conceivably be premised.

The product in question is a portable machine used by plumbers for cutting, reaming and threading pipe. Its motor is encased in a housing which is mounted on a tripod. The power switch is located in a recessed area on the underside of the housing. If the operator is standing on this side of the machine, the switch is easily within his reach; however, if he is operating the machine from the front or opposite side, the switch is not readily accessible. When Collins' jacket became entangled in the rotating pipe, he was unable to reach the power switch. By the time one of his employees turned the power off, Collins' left arm had been broken, dislocated and mangled, requiring amputation above the elbow.

The Rigid 300 is not equipped with any kind of emergency power cut-off device. Neither the machine nor the operator's

manual furnished by the manufacturer contains any warnings alerting the potential user to operate the machine from the power switch side or cautioning against the danger that loose clothing might become entangled.

It was plaintiff's contention that such warnings should have been given and that the Rigid 300's design rendered defendant's product unreasonably dangerous. The design defects alleged by the plaintiff related to the location of the power switch and the absence of any emergency cut-off device. Plaintiff introduced a considerable amount of expert testimony to support these contentions, including evidence regarding the feasibility of relocating the power switch on the machine so that it would be accessible from all operating positions, and evidence that it would have been feasible and relatively inexpensive to equip the machine with an emergency cut-off device ("kill-switch"), located either on the top of the machine or in the form of a foot switch. Without extensively reviewing the evidence introduced by plaintiff, suffice it to say that a considerable amount of evidence, in the form of expert testimony and otherwise, was introduced in support of plaintiff's claim that the Rigid 300's design rendered it unreasonably dangerous, and that the danger of injury was enhanced by the manufacturer's failure to post warnings on the machine or in the operator's manual.

The jury was properly charged with the task of determining whether the design of defendant's product rendered it unreasonably dangerous, and if so, whether this dangerous condition was the principal cause of Collins' injuries. The jury concluded that plaintiff's injuries were caused by the dangerous condition of the product and by the negligence of the plaintiff, apportioning 65% of the responsibility to the defendant and 35% to plaintiff, in accordance with Wisconsin law.

The conclusion reached by the majority is not based upon a finding that the trial court improperly instructed the jury or that plaintiff's theory of liability was legally insufficient. Nor

is it grounded upon a finding that evidence was improperly admitted, or that some other trial error was committed. It is based solely on the majority's *factual determination* that defendant's product "was reasonably safe for its intended use . . . and that appellee's negligence was the sole cause of the injuries sustained . . .".

After reviewing a cold record, the majority thus substitutes their evaluation of the evidence for that of a jury which saw the witnesses and heard their testimony at trial. In my opinion, the result reached by the majority improperly and inexcusably invades the province of the jury. I would affirm.

APPENDIX C

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

September 22, 1975

By the Court:

Bernard J. Collins and Marian Collins, Plaintiffs-Appellees, vs. The Ridge Tool Company, Defendant-Appellant.	Appeal from the United States District Court for the Western District of Wisconsin. (69 C 216)
No. 73-1337.	

In light of the fact that the mandate in this cause was inadvertently issued on September 12, 1975 during the pendency of this Court's consideration of appellees' petition for rehearing en banc,

It Is Ordered that the mandate in this case be, and the same is hereby, Recalled.

APPENDIX D

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

October 14, 1975

Before
Hon. Thomas E. Fairchild, Chief Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. Wilbur F. Pell, Jr., Circuit Judge
Hon. John Paul Stevens, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. Philip W. Tone, Circuit Judge
Hon. William J. Bauer, Circuit Judge
Hon. William J. Campbell, Senior District Judge*
Hon. Robert A. Grant, Senior District Judge*

Bernard J. Collins and Marian Collins, Plaintiffs-Appellees, No. 73-1337. vs. The Ridge Tool Company, Defendant-Appellant.	Appeal from the United States District Court for the Western District of Wisconsin. No. 69-C-216. James E. Doyle, *Judge*

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, a majority of the panel having voted to deny the petition for

* Senior District Judge William J. Campbell of the Northern District of Illinois and Senior District Judge Robert A. Grant of the Northern District of Indiana are sitting by designation.

rehearing,[1] and a majority of the active members of the court having voted to deny a rehearing *en banc*,[2]

It Is Ordered that the petition for rehearing and suggestion that it be reheard *en banc* be, and the same is hereby, Denied.

[1] Judge Campbell voted to grant the petition for rehearing.

[2] Chief Judge Fairchild and Judge Stevens voted to grant a rehearing *en banc*.

APPENDIX E

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 30, 1971

Before
Hon. John S. Hastings, Senior Circuit Judge
Hon. Thomas E. Fairchild, Circuit Judge
Hon. William J. Campbell, Senior District Judge[1]

John McPhee, Jr., and Sheri McPhee, Plaintiffs-Appellees, vs. The Corinth Machinery Company, a/k/a Corinth American Machinery Company, Defendant-Appellant.	Appeal from the United States District Court for the Western District of Wisconsin.
No. 18,568	

ORDER

This is a diversity action for personal injury. Plaintiff John McPhee, Jr., was injured while working as a sawyer. Plaintiff Sheri McPhee is his wife. Defendant Corinth Machinery Company had supplied McPhee's employer with components of a saw mill. A unit of the machinery, called the carriage, which runs on a track, unexpectedly moved forward and pushed McPhee into the saw. McPhee had been at his station, from which movement of the carriage is controlled, but, leaving the control lever in neutral, had stepped onto the track ahead of

[1] The Honorable William J. Campbell, Senior District Judge, Northern District of Illinois, is sitting by designation.

the carriage to dislodge a splinter from near the saw. Both McPhee's legs were cut off.

By special verdict the jury found defendant causally negligent in respect to (a) failing to provide a locking device (to hold the control lever in neutral) and (b) failing properly to inspect and supervise the installation. The court had answered questions of the special verdict so as to find as a matter of law that John McPhee was causally negligent in respect to proceeding into the carriage area in the manner that he did. The jury found that John McPhee was not negligent in respect to activating the control lever after proceeding into the carriage area and attributed 80% of the total causal negligence to defendant and 20% to John McPhee. Judgment was entered in favor of plaintiffs for 80% of the damages found. The court denied defendant's motions after verdict, and motions on which ruling had been reserved, except with respect to $111,000 awarded by the jury for impairment of earning capacity, which the court determined was greater than the evidence would support. The court found that $53,800 would reasonably compensate John McPhee for impairment of earning capacity and ordered a new trial on that issue unless John McPhee should accept an amended judgment based on the reduced amount. He so elected. Defendant appealed from judgment in favor of Sheri McPhee for $120,000 and amended judgment in favor of John McPhee for $354,349.46, plus, in each case, interest and costs.

We have considered defendant's arguments that the verdict cannot be sustained as a matter of law. We are satisfied that the evidence created jury issues as to the particulars in which defendant was found causally negligent and plaintiff was found not causally negligent. There was evidence from which the jury could find that defendant should reasonably have foreseen need for a locking device. Although the contract between defendant and McPhee's employer did not expressly obligate defendant to inspect and supervise the installation of the com-

ponents it supplied, there was evidence that in fact defendant sent its salesman out after the installation "to inspect to make sure that the equipment had been installed properly" and with authority to comment about any modification which had been made in the course of installation which would affect the operation of the unit. Liability may be predicated upon negligence in performing services so volunteered. *American Mutual Liability Ins. Co. v. St. Paul Fire & Marine Ins.* (1970), 48 Wis2d 305, 179 NW2d 864; *Hartford Steam Boiler Inspection & Ins. Co. v. Pabst Brewing Co.* (7th Cir., 1912), 201 F. 617; *Wulf v. Rebbun* (1964), 25 Wis2d 499, 131 NW2d 303. See Restatement of Torts 2d, Sec. 324A, p. 142.

We are also satisfied, as was the trial court, that it cannot be said as a matter of law that McPhee's causal negligence was equal to or greater than defendant's. In the light of the serious injuries sustained by Mr. McPhee, the permanent impairment of the capacity to enjoy life, as well as economic loss, physical and emotional consequences shown, and the impact of all this upon Mrs. McPhee, we conclude that none of the damage awards (after reduction of one of them by the district court) is excessive.

We have also considered the defendant's several claims of error upon the trial. We find no prejudicial error.

Accordingly, upon our review of the record, the briefs submitted, and the oral argument,

It Is Ordered that the clerk of this court enter judgment affirming the judgment and amended judgment appealed from.

APPENDIX F

In the United States District Court
For the Western District of Wisconsin

John McPhee, Jr., and Sheri McPhee,
Plaintiffs,

v.

The Corinth Machinery Company, a/k/a Corinth American Machinery Company,
Defendant.

68-C-71.

OPINION AND ORDER

This diversity action for damages for personal injuries was tried to a jury which returned a special verdict. The jury found that the defendant had been negligent in failing to provide a locking device on a sawmill machine and in failing properly to inspect and supervise the installation of the machine; and that this negligence in both respects had been a cause of the injuries of the plaintiff John McPhee. The court found as a matter of law that the plaintiff John McPhee had been negligent in proceeding into the carriage area of the sawmill in the manner he had just prior to the accident, also found as a matter of law that his negligence had been a cause of his injuries, and entered answers to this effect upon the special verdict form. The jury found that the plaintiff John McPhee had not been negligent in another respect, namely, in activating the carriage control lever after he had proceeded into the carriage area. The jury apportioned 80% of the total causal negligence to the defendant and 20% to the plaintiff John McPhee.

The court found that $17,136.83 was the sum which would reasonably compensate the plaintiff John McPhee for his medical and hospital expenses, and the court entered this sum on the special verdict form. The jury found that $11,000 would reasonably compensate the plaintiff John McPhee for his loss of past wages, $111,000 for impairment of his earning capacity, and $361,000 for his pain, suffering and disability in the past and in the future. The jury found that $150,000 would reasonably compensate the plaintiff Sheri McPhee for the loss of the society and companionship of her husband John.

At the close of the plaintiffs' case, the defendant moved for a directed verdict, and renewed this motion at the conclusion of all the evidence. The court reserved rulings on both motions.

Judgment has been entered awarding $400,109.46 (80% of his gross damages) to plaintiff John McPhee, and $120,000 (80% of her gross damages) to plaintiff Sheri McPhee.

Defendant has moved for judgment notwithstanding the verdict (which motion is available to it, by reason of its motion for a directed verdict at the close of all the evidence) and, in the alternative, has moved for a new trial.

Motion for Judgment Notwithstanding the Verdict

The grounds for this motion are: (1) that there was no evidence of negligence on the part of the defendant; (2) that there was no evidence that the product of the defendant was in a defective condition when it left its possession or control, or that it was unreasonably dangerous to the user thereof when used as it was intended to be used; and (3) that as a matter of law the evidence showed that at least 50% of the total causal negligence was attributable to the plaintiff.

The plaintiffs clearly chose to proceed at the trial on a common law negligence theory, to the extent this theory is to be

distinguished from the so-called "strict liability" theory, *Dippel v. Sciano*, 37 Wis.2d 443 (1967). Therefore, I consider ground (2) of defendant's motion only as it bears on the negligence of defendant, referred to in ground (1).

I test defendant's motion by inquiring whether, viewing the record most favorably to the plaintiff, there is credible evidence: from which negligence on the part of the defendant could reasonably be inferred; and from which it could reasonably be inferred that less than 50% of the total causal negligence was attributable to the plaintiff. I conclude that there is credible evidence to support both inferences.

There is credible evidence from which the jury might reasonably have inferred the following facts, among others: While operating the machine, the plaintiff ("the plaintiff" will mean plaintiff John McPhee hereinafter, unless otherwise stated) brought the log carriage to a stationary position on the tracks by placing the hand lever in a neutral position; that he then proceeded down into the carriage track area to a point between the stationary carriage and the revolving saw blade; that without any force being applied to the hand lever by plaintiff or by any other person, the carriage began to move toward him, struck him, and forced him into the saw blade. In similar situations other sawyers in the industry entered comparable areas in which the unexpected movement of the log carriage would create a danger to persons in its path on its tracks. A manufacturer of such equipment might reasonably have been expected to be aware of this practice. Certain component parts of the sawmill equipment sold by defendant to plaintiff's employer were not designed so as to render the equipment safe for its intended use, particularly with respect to the danger that the carriage, while stationary, might begin to move without human intervention. Defendant accepted and actually undertook to discharge certain responsibilities in inspecting and supervising the installation of the machine in the plant of plaintiff's employer, and in so

doing it failed to perform its duty to exercise reasonable care to give adequate warning of dangers attendant upon the proper use of the machine or warning of the facts which made such dangers likely. The danger that the carriage might move, although the hand lever had been placed in a neutral position, was not open and obvious to an operator.

Since the court had found the plaintiff casually negligent, as a matter of law in proceeding into the carriage area in the manner that he did, it became the duty of the jury to compare his causal negligence with the causal negligence of the defendant. It is a rare occasion on which the court is permitted to set aside the comparison determined by the jury. This should be particularly rare in situations in which the kinds of causal negligence to be compared are so dissimilar. For example, to compare the failure of lookout on the part of one automobile driver with the failure of lookout on the part of another may sometimes be an exercise simple enough to permit the court to conclude that the jury has performed it wholly erroneously. But it is difficult to draw a similar conclusion when the jury is called upon to compare the causal negligence of the defendant in design and in inspecting and supervising the installation of the machine with the causal negligence of the plaintiff in entering the carriage area in the manner he chose. I cannot conclude, as a matter of law, that the latter equalled or exceeded the former.

Motion for a New Trial

In the alternative, defendant has moved for a new trial on 14 grounds. The comments I have made with respect to defendant's motion for judgment notwithstanding the verdict are generally applicable to grounds numbered 1 through 5, and 13. It is necessary only to add a conclusion, which I now do, that not only was there credible evidence from which the jury's answers to the special verdict could reasonably be inferred, but that this evidence was substantial; I exclude for the present the answers to the damage questions, which I will discuss below.

The record of the trial adequately discloses the court's reasons for the rulings now challenged by the defendant in grounds numbered 7, 8, 10, 11, and 12 which relate to the empaneling of the jury, evidentiary rulings, a refusal to give certain requested instructions, a motion for mistrial because of allegedly improper behavior by the attorney for the plaintiff, and the form of the special verdict.

Ground 9 is a contention that the court erred in giving certain instructions, over objection. The principal contention here appears to relate to an instruction that it was the duty of the defendant to determine that the equipment it sold was designed "so as to render it safe for its intended use." Form instruction 1370 promulgated by the Board of Circuit Judges of the State of Wisconsin includes this language: "[I]t is the duty of a manufacturer to exercise ordinary care in the design, construction, and manufacture of its product so as to render such product safe for its intended use." The instruction given with respect to the defendant manufacturer's duty to warn is a virtually verbatim repetition of Wisconsin form instruction 1371. Defendant also objects to an instruction which the court gave explaining the operation of the Wisconsin Workmen's Compensation Act. The trial record will disclose that the matter of workmen's compensation wove its way into the trial, in significant part on the defendant's initiative, to such an extent that the wisest and most practical course ultimately appeared to be to make its operation accurately known to the jury.

Ground 14 is that "the interests of justice" require a new trial. Except for the matter next to be discussed in ground 6, I believe that the interests of justice do not so require.

Ground 6 includes a contention that the verdict of the jury as to damages is excessive and perverse, that the percentage of causal negligence attributed to plaintiff is contrary to the law and the evidence, and that the jury's verdict in these two respects

appears to have been given under the influence of passion, bias and prejudice. I have already concluded that there was substantial credible evidence to support the jury's comparison of the causal negligence of the plaintiff and the defendant.

I turn now to the jury's answers to the damage questions.

I conclude that none of the answers to the damage questions was perverse, and that none appears to have been given under the influence of passion, bias, and prejudice. Except for the jury's answer with respect to the impairment of the earning capacity of plaintiff John McPhee, I conclude that none of the damages awarded by the jury to either plaintiff was excessive. There was substantial credible evidence to support the award for loss of past wages. It would be difficult to overvalue the damages suffered by the plaintiff John McPhee in the past, and certain to be suffered in the future, with respect to pain and suffering; impairment of health, physical ability, and bodily functions; disfigurement; humiliation, embarrassment and worry; and deprivation of usual activities, benefits and enjoyments. The same can be said of the damages suffered by Sheri McPhee by deprivation of her husband's aid, assistance, comfort, and society, past and future.

I conclude that the award of $111,000 to plaintiff John McPhee for impairment of his earning capacity is excessive. At the time of the accident, based on an hourly rate of $1.60 an hour, and a work week of 40 hours, his annual gross income would have been about $3300. The jury might reasonably have concluded that his earnings as a sawyer or in other active employment would increase over the years. An estimated annual average of $5000 gross income over his working life would have been reasonable. Despite his extreme disability, it would have been unreasonable to suppose that he would be totally unable to earn money during his life. An average annual impairment in the sum of $3500 would have been reasonable. His life expectancy was 37 years. It would have been reasonable to assume that at least 30 of these would have been productive. The present value of $3500 per year for 30 years, at a rate of five per cent per annum, is about $53,800.

I conclude that the jury award of $111,000 for impairment of earning capacity was not due to perversity or prejudice, and was not the result of error occurring during the course of the trial. I conclude that it was excessive, probably because the jury encountered difficulty with the factor of economic inflation and with the concept of reducing to present value an award for future loss of earnings.

I conclude that $53,800 is a sum which will reasonably compensate plaintiff John McPhee for impairment of his earning capacity.

Order

It is ordered that the defendant's motion for a directed verdict, made at the close of plaintiffs' case, is hereby denied; that the defendant's motion for a directed verdict, made at the close of all the evidence, is hereby denied; and that the defendant's motion for judgment notwithstanding the verdict is hereby denied.

It is further ordered that the verdict with respect to the award for impairment of earning capacity of plaintiff John McPhee is hereby set aside, and that the judgment herein in his favor is hereby amended by being reduced by the sum of $88,800 (which is 80% of $111,000) and that the defendant's motion for a new trial is hereby granted with respect to the issue of damages for impairment of earning capacity, and that the defendant's motion for a new trial as to all other issues is hereby denied; provided, however, that the plaintiff John McPhee may elect, in lieu thereof, to have an amended judgment entered herein in his favor, reduced from the present judgment by $45,760 (which is 80% of the difference between $111,000 and $53,800) if the

plaintiff, John McPhee, by his attorney, notifies the court within 20 days hereafter by letter, with a copy to opposing counsel, that elects to accept the entry of an amended judgment, reduced by said sum of $45,760, and to remit to defendant any sum which he may already have received in excess of the total amount awarded to plaintiff John McPhee by said amended judgment. Should plaintiff John McPhee elect to appeal from this order, the time within which he may notify the court of such election will be automatically extended until 20 days following the date of notification to counsel for the plaintiff that the mandate of the appellate court has been received by the clerk of this court.

Entered this 2nd day of March, 1970.

By the Court:

/s/ JAMES E. DOYLE
District Judge

APPENDIX G

(Note: Opinion not published; noted in 487 F.2nd 1404, lower court affirmed.)

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Oral Argument May 30, 1973

November 9, 1973

Before
Hon. Thomas E. Fairchild, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. John W. Reynolds, District Judge*

James A. Sievers,
Plaintiff-Appellee,
No. 72-1628 vs.
Keebler Company, a Foreign Corporation,
Defendant-Appellant,
vs.
McCleary Industries, Inc.,
Third-Party Defendant.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 69-C-155
James E. Doyle, Judge

ORDER

It Is Ordered and Adjudged by this court that the judgment of the United States District Court for the Western District of Wisconsin entered in this cause be affirmed on the opinion and order of the said district court. *Sievers v. Keebler*, Case No. 69-C-155 (W.D. Wis., Nov. 30, 1971).

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* Chief District Judge John W. Reynolds of the Eastern District of Wisconsin is sitting by designation.

The district court determination that Wisconsin's comparative negligence law is "better" law than Illinois' contributory negligence is consistent with prior decisions of this court and the Illinois and Wisconsin Supreme Courts. Judge Campbell discussed the issue in *Elston v. Morgan*, 440 F.2d 47, 50 (1971), stating:

> "* * * It is, of course, regrettable that the State of Illinois here bars one of its citizens so seriously injured from any recovery whatsoever simply because of its continued adherence to this cruel and antiquated doctrine, inherited long ago from the courts of England and long since discarded by that country. The harsh Illinois doctrine of contributory negligence barring any recovery was recently again before the Supreme Court of Illinois in Maki v. Frelk, 40 Ill.2d 193, 239 N.E.2d 445 (1968). In that case the majority opinion recognized that the doctrine should be discarded in favor of a more modern comparative negligence doctrine, but felt compelled to defer to the legislature to make the change. The excellent dissenting opinion written by Mr. Justice Ward, with Mr. Justice Schaefer concurring, took the position that the contributory negligence doctrine was judicially created in Illinois and that therefore the court had the responsibility to make the change. In his dissent, the learned Justice stated:
>
> " 'I am unpersuaded by the argument that there are practical considerations which dictate a retention of the contributory negligence rule. We are told that the adoption of comparative negligence would increase litigation and court congestion, encourage negligent driving and cause insurance rates to be raised. The reply to such "practical" argument is that the dominating questions before our court are whether the old rule contended for is one often of harshness and unfairness and whether the rule proposed for adoption would better serve to attain more just dispositions in negligence cases. The so-called practical

> considerations advanced must properly be considered as subordinate to the primary concern for more just judicial dispositions of these cases. Secondly, and persuasively, the evidence assembled of life under a comparative negligence form fails to confirm the fears expressed by the defendant and the *amicus*. See Maloney, From Contributory to Comparative Negligence: A Needed Law Reform, 11 U.Fla.L. Rev. 135, 162 (1958); Bress, Comparative Negligence, 43 A.B.A.J. 127, 130 (1957); Peck, Comparative Negligence and Automobile Liability Insurance, 58 Mich.L.Rev. 689, 726 (1960); and Rosenberg, Comparative Negligence in Arkansas Before and After Surgery, 13 Ark.L.Rev. 89, 108 (1959).' 40 Ill.2d at 203-204, 239 N.E.2d at 451.
>
> "Indeed in our own Circuit, Wisconsin, with its enlightened comparative negligence doctrine has completely confirmed the conclusion of Mr. Justice Ward in rejecting the so-called 'practical' arguments against the adoption of a comparative negligence standard by Illinois. Although it is to be hoped that the Illinois Legislature or the Illinois Supreme Court may soon heed Justice Ward's admonition and consider anew whether the best interests of its citizens are served by permitting such unfortunate results as are presented here, it is beyond our power to do anything but follow the existing law of Illinois as was done by the trial judge."

The appellants argue that the recent Wisconsin Supreme Court decision in *Hunker v. Royal Indemnity Co.*, 57 Wis.2d 588, 204 N.W.2d 897 (1973), requires a different result from that reached by the district court. We disagree. Neither of the concerned parties in *Hunker* were residents of Wisconsin. The court pointed out that no Wisconsin citizen suffered by the application of Ohio law. Id. at 610, 204 N.W.2d at 908. Sievers, the plaintiff in this action, was a Wisconsin resident. In addition, the Wisconsin Supreme Court held that the legal trend is towards laws, such as Ohio's, which bar suits against coemployees.

Id. at 607, 204 N.W.2d at 907. Illinois' contributory negligence law, which appellant seeks to have applied in this case, is, however, anachronistic, and the legal trend is toward comparative negligence. In short, the Wisconsin Supreme Court held in *Hunker* that a recently enacted Ohio law should be applied in that suit between Ohio residents. It does not follow that Wisconsin would apply an anachronistic foreign law which bars recovery to a Wisconsin citizen. We feel that the district court opinion, which we have adopted, is consistent with Wisconsin law and that the *Hunker* decision does not change that result.

APPENDIX H

In the United States District Court
For the Western District of Wisconsin

James A. Sievers,
Plaintiff,
v.
Keebler Company, a Foreign Corporation,
Defendant and Third-Party Plaintiff,
v.
McCleary Industries, Inc.,
Third-Party Defendant.

69-C-155.

OPINION AND ORDER

This is a civil action for damages for personal injuries allegedly arising out of an industrial accident in which plaintiff caught his arm in a machine designed and manufactured by the defendant in the State of Illinois and located at the plant of the third-party defendant in the State of Illinois. At the time of the accident and at the time of the commencement of this action, plaintiff was a citizen of the State of Wisconsin. Defendant is a Delaware corporation with its principal place of business in Illinois. The third-party defendant is an Illinois corporation with its principal place of business in Illinois. Jurisdiction is asserted under 28 U.S.C. § 1332.

A pre-trial conference was held, at which time the question was considered whether the substantive law of Illinois or that of Wisconsin should be applied to the tort aspects of the case.

Briefs have been filed on the above question, with which this opinion now deals.

In determining whether to apply the substantive law of Illinois or that of Wisconsin, I must follow the choice-of-law rule that a Wisconsin Court would follow. *Klaxon v. Stantor Electric Mfg. Co.*, 313 U.S. 487 (1941); *Korth v. Mueller*, 310 F. Supp. 878 (W.D. Wis. 1970); *Satchwill v. Vollrath Co.*, 293 F. Supp. 533 (E.D. Wis. 1968); *Castonzo v. General Casualty Co. of Wisconsin*, 251 F. Supp. 948 (W.D. Wis. 1966).

Under Wisconsin law, the determination of which substantive law applies requires a two-step analysis. *See Wilcox v. Wilcox*, 26 Wis. 2d 617 (1965). The first step—a determination of whether a true conflict of law exists—requires an analysis of the number of contacts with each of the competing jurisdictions and of the qualitative significance of those contacts. The second step—choosing which law is to apply—requires an analysis of the contacts of each jurisdiction in light of the "choice-influencing considerations" set forth in *Heath v. Zellmer*, 35 Wis. 2d 578, 596 (1967). The second step begins with a "weak presumption" in favor of the law of the forum. *Heath, supra*, at 597; *Zelinger v. State Sand & Gravel Co.*, 38 Wis. 2d 98 (1968); *Conklin v. Horner*, 38 Wis. 2d 468 (1968).

The contacts of the competing jurisdictions are not evenly distributed: Wisconsin is the forum state and the residence of plaintiff; Illinois is the place of business of defendant and of the third party defendant, place of accident and place of employment of plaintiff. Although the location of the forum and residence of one of the parties are not facts which call for the application of the substantive law of one jurisdiction over that of the other, their presence in the instant case indicates that Wisconsin has a "significant interest" in the outcome of the

controversy. Inasmuch as Wisconsin and Illinois have disparate laws regarding the effect of a finding of negligence on the part of plaintiff,[1] and inasmuch as both jurisdictions have a significant interest in the outcome of the dispute, I find that a true conflict exists in the present action.

Since a true conflict exists, it is not appropriate to decide which state's negligence law shall apply simply by counting the number of contacts of each jurisdiction. Rather, resort must be had to the "choice-influencing factors" set forth in *Heath v. Zellmer, supra*, at 596:

(1) predictability of results;

(2) maintenance of interstate and international order;

(3) simplification of the judicial task;

(4) advancement of the forum's governmental interests; and

(5) application of the better rule of law.

The Wisconsin Supreme Court has held consistently that the first factor has little relevance in tort actions. *Heath, supra* at 596. Although the Wisconsin Supreme Court has also generally found the second factor to be of little significance, defendant suggests that the imposition of Wisconsin law in the present action might lead to a refusal of Illinois employers to employ Wisconsin residents because of the greater likelihood of employee recovery under Wisconsin law.

The third factor prompts no clear response. This court's greater familiarity with Wisconsin comparative negligence law

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[1] In Illinois, a finding of contributory negligence may bar any recovery by the plaintiff. *Maki v. Frelik*, 40 Ill. 2d 193, 239 N.E. 2d 495 (1968); *Prill v. City of Chicago*, 317 Ill. App. 202, 46 N.E. 2d 119 (1942). Wisconsin, on the other hand, has a comparative negligence statute under which the plaintiff's own negligence will bar his recovery only if it is as great as, or greater than, the negligence of the defendant. Section 895.045 Wis. Stats. (1969). (Statute in force at the commencement of this action).

is balanced by the arguably easier applicability of a rule of law in which a plaintiff's negligence acts as a bar to recovery. See *Heath, supra*, at 600.

In considering the importance of the advancement of the forum's governmental interest, I must give this factor as much weight as would a state court. The Wisconsin Supreme Court states in *Heath, supra*, at pages 600-01:

> "It is the duty of our court to further Wisconsin's governmental interest as exemplified in the policies behind its law. The policy of our tort law is to provide compensation for persons who are injured by negligent conduct . . . To deny recovery for ordinary negligence is to defeat Wisconsin policy of compensating victims of ordinary negligence. It is the policy of Wisconsin to provide compensation to those persons whether they be residents of this state or whether they come from another jurisdiction."

Wisconsin's deeply entrenched commitment to the policy of comparative negligence is reflected in over 40 years of legislative history.[2] Furthermore, recent pronouncements of the Wisconsin Supreme Court underscore Wisconsin's commitment. See *Heath, supra; Zelinger, supra; Conklin, supra*. I conclude that the application of Illinois law which bars recovery for contributory negligence would frustrate a longstanding and deeply rooted governmental interest of the State of Wisconsin.

The fifth factor—application of the better rule of law—presents different but somewhat overlapping considerations from those taken into account when advancing the forum's governmental interest. Contributory negligence has been described as

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[2] Further evidence of Wisconsin's commitment to the comparative negligence principle is the enactment of an amended comparative negligence statute which liberalizes recovery for ordinary negligence by eliminating the automatic 50 per cent bar rule. *See* Session Laws, ch. 47, 1971.

a "discredited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight." *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953). Comparative negligence law, however, implements a social policy of spreading the risk of loss due to ordinary negligence and of compensating its victims. While the doctrine of contributory negligence has its adherents, I find that Wisconsin law of comparative negligence is the "better rule of law." *See e.g., Decker v. Fox River Tractor Co.*, 324 F. Supp. 1089 (E.D. Wis. 1971); *Frummer v. Hilton Hotels International, Inc.*, 314 N.Y.S. 2d 335 (1969); *Clough v. Liberty Mutual Insurance Co.*, 282 F. Supp. 553 (E.D. Wis. 1968).

Accordingly, upon the basis of the entire record herein, It Is Hereby Ordered that Wisconsin substantive law shall apply to the tort aspects of the present action.

Entered this 30th day of November, 1971.

By the Court:

/s/ JAMES E. DOYLE
District Judge

APPENDIX I

In the United States District Court
For the Western District of Wisconsin

James A. Sievers,
Plaintiff,
v.

Keebler Company, a foreign corporation,
Defendant and
Third-Party Plaintiff,
v.

McCleary Industries, Inc.,
Third-Party Defendant.

69-C-155

ORDER

Defendant Keebler has moved, timely, for judgment notwithstanding the verdict. The principal basis for the motion is that Illinois law of contributory negligence, rather than Wisconsin law of comparative negligence, should have been applied. This question was considered and decided prior to trial and I adhere to that decision.

In the alternative, defendant Keebler has moved for a new trial. I find and conclude that the verdict was based upon substantial evidence. My reasons for denying defendant leave to introduce portions of the deposition of John Richmond are embodied in the record, and I adhere to them. The same is true of my reasons for choosing the form of the special verdict, and my reasons for applying the Wisconsin rule of comparative negligence rather than the Illinois rule of contributory negligence.

Defendant objects to the instructions relating to the duty of a workman, the duty of a manufacturer to warn, and the duty of an installer or servicer of a product; the contention, among others, is that these instructions reflected Wisconsin law, rather than Illinois law; but there is no showing by defendant that Illinois law differs on any of these points, nor was such a contention made during the trial, so far as I can now recall. With respect to the instructions on each of these points, I conclude that there was substantial credible evidence which made each of them appropriate.

For the reasons stated herein and elsewhere in the record, It Is Hereby Ordered that the motion for judgment notwithstanding the verdict is denied and the motion for a new trial is denied.

Entered this 30th day of March, 1972.

By the Court:

/s/ JAMES E. DOYLE
District Judge

IN THE

SUPREME COURT OF THE UNITED STATES

No. ~~75-896~~ 75-986

BERNARD J. COLLINS and MARIAN COLLINS,
Petitioners,

vs.

THE RIDGE TOOL COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals
For the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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For the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF CASE

The undisputed facts upon which the Court of Appeals based its decision and which are not mentioned in the petition are, in the words of the Court: "* * * it is undisputed that appellee herein had, at the time of the accident, 'owned five Rigid 300's', and prior thereto had accomplished a pipe operation with the Rigid 300 'hundreds of times'. Appellee further testified that he appreciated and was fully aware of the danger of being entangled in the pipe while it was turning in the machine. * * * it is uncontested that appellee was a master plumber for several years prior to the date of the accident. Therefore, he

had many years of training and experience in using and operating the machinery indigenous to his business, and had attained enough expertise, in fact, to have risen to the status of a master plumber. * * * that appellee was a professional in his trade who, because of past experience, had to be fully cognizant of the hazards involved in his work." (A-13). These are the facts, peculiar to this case, which the Court below emphasized, and upon which it found that there was no evidentiary basis to support the jury's verdict. It did *not* weigh conflicting evidence but relied on these *undisputed facts*.

In order to understand the importance which the Court below attached to petitioner Bernard Collins' prior training, knowledge, and use of the Ridgid 300, a fuller description of the machine and the circumstances of the accident are necessary.

The Ridgid 300 is a portable machine used by plumbers for cutting, reaming, and threading pipe. Prior to its development, plumbers performed those operations by securing the pipe in a stationary position and manually rotating a hand tool around the pipe. With the Ridgid 300, the pipe is rotated and the tool is held stationary.

The Ridgid 300 is composed of an electric motor encased in a cast aluminum housing and mounted upon a collapsible tripod. The pipe is placed through a horizontal hole, which extends through the center of the housing and through circular devices at the front and back of the machine. The device at the back of the machine centers the pipe. The device at the front clamps or secures the pipe in place. Two horizontal bars extend forward from either side of the housing. An attachment, which holds the cutting, threading, and reaming tools, is mounted on the horizontal bars. The cutter and the reamer are connected to one side of the attachment in a way which permits their movement from a vertical to a horizontal position. When either tool is not in use, it is held in the vertical position

to the side of the section of pipe being worked on; when it is used, it is brought into contact with the pipe by pulling it down into a horizontal position.

The switch is situated in an indentation on the side of the housing beneath the carriage arm support opposite the side of the carriage on which the cutter and threader are mounted. That position was selected to protect the switch from physical damage, dirt, and moisture, to eliminate the danger of accidentally starting the machine, and to keep it near the operator while he uses the machine.

When the Ridgid 300 is used to cut pipe in accordance with instructions in the Operator's Manual, the pipe is inserted into the unit, the speed chuck and centering devices are tightened, the cutter is applied to the pipe, and its blade is tightened until it contacts the pipe. The power is then turned on. The cutter blade is tightened until the cut is completed.

On November 28, 1967, Collins was using the machine to cut a 12 inch section of pipe. He was wearing a light-weight quilted jacket at the time. He does not recall tightening the centering device and testified that he believes he did not do so. Collins made a measurement on the pipe and turned the machine on before positioning the cutter. When he reached for the cutter, which was in its vertical position, the front of his jacket became entangled in the rotating pipe. He could not reach the power switch and the machine tipped over, broke, dislocated, and injured his left arm before the machine was stopped by one of his employees.

The machine was first marketed in 1958. Between 1958 and the time of the accident, 57,215 machines were sold. Prior to the date of the accident, only one accident had been reported to the respondent. Before the commencement of this suit, no claim for injuries arising out of the use of the Ridgid 300 had ever been made against the respondent.

ARGUMENT

This is a diversity case involving a claim arising solely under the law of Wisconsin. This Court has consistently refused to grant certiorari in negligence cases arising under state law where, as in this case, the sole question is whether the Court of Appeals correctly applied state court appellate standards in reviewing the evidence.

> "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220 at 227.
>
> "Cases like this, I am firmly convinced, do not belong in this Court. To review individualized personal injury cases, in which the sole issue is sufficiency of the evidence, seems to me not only to disregard the Court's proper function, but also to deflect the Court's energies from the mass of important and difficult business properly here." Mr. Justice Stewart, concurring, in *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 at 111 (1959).

I. There Is No Intra-Circuit Conflict of Decision or Denial of Seventh Amendment Rights.

No intra-circuit conflict,[1] or deprivation of Seventh Amendment rights to a jury trial is created, as asserted by the petitioners, merely because the Court of Appeals, in exercising a meaningful supervision of this jury's verdict, chose to reverse rather than affirm. The Court of Appeals does not have to agree with the District Court's appraisal of the evidence. As this Court said in *Neely v. Eby Construction Co.*, 386 U.S. 317, 322 (1967):

[1] Dissenting opinions and split votes on petitions for *en banc* rehearing in the court below, do not create intra-circuit conflicts, at least of the type reviewed on certiorari.

> "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n. o. v.* than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment *n. o. v.* See *Baltimore & Carolina Line, Inc. v. Redman* [295 U.S. 654]. Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment *n. o. v.* on appeal."

In affirming the lower court in *McPhee v. Corinth Machinery Co.* (7th Cir. 1971), reproduced in Petitioners' Appendix E, and *Sievers v. Keebler Company*, 487 F.2d 1404 (7th Cir. 1973), reproduced in Petitioners' Appendix G. the Court of Appeals simply assessed the unique facts of those cases and concluded that there was substantial evidence to support the verdicts. In the instant case, it concluded that there was no evidentiary basis for the finding that Collins' injuries resulted from the manufacturer's negligence. A-13. In so doing, it did not create an intra-circuit conflict by applying different standards of review to the same facts. On the contrary, it applied the same standards to different facts. The law does not require that plaintiffs always win.

II. There Is No Conflict With Applicable State Appellate Standards.

It is undisputed that in this diversity case, Wisconsin law applies. Accordingly, the Court of Appeals, using the Wisconsin standard, has a duty to review the evidence. If it concluded that there was no evidentiary basis to the jury's finding, it was obliged to set the verdict aside. That is precisely what the Court of Appeals did. It held that the undisputed facts required a finding that the manufacturer was altogether free of negligence. In doing so, it was merely applying the appropriate

standard of review. As the Wisconsin Supreme Court recently said in *Schuh v. Fox River Tractor Co.*, 63 Wis.2d 728, 744, 218 N.W.2d 279 (1974):

> "Generally, the apportionment of negligence is for the jury and will not be upset except where it is manifest as a matter of law that the allocation is unreasonably disproportionate. Where, however, it appears that the negligence of the plaintiff is as a matter of law equal to or greater than that of the defendant, it is not only within the power of the court but it is the duty of the court to so hold."

III. The Court of Appeals Correctly Followed Wisconsin Law in Holding That There Was No Evidentiary Basis to Support the Jury's Finding.

The petition asserts the fallacious proposition that, under the comparative negligence doctrine in Wisconsin, an appellate court must affirm a verdict in the absence of prejudicial error in the admission of evidence or in the charge to the jury. That is not the law of Wisconsin. Under Wisconsin law, appellate courts have a duty as a *matter of law* to dismiss an action where there has been a failure to meet the legal standard for liability.[2] The Wisconsin Supreme Court has recently reaffirmed the appellate court's duty to dismiss the case where a product cannot be found to be unreasonably dangerous because the alleged defect is open, obvious, and known to the plaintiff. *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 69 Wis.2d 326, 230 N.W.2d 794 (1975). In accord, *Yaun v. Allis Chalmers*, 253

[2] *Hollie v. Gilbertson*, 38 Wis.2d 245, 250, 156 N.W.2d 462 (1968); *Ernst v. Greenwald*, 35 Wis.2d 763, 773, 151 N.W.2d 706 (1967); *Lautenschlager v. Hamburg*, 41 Wis.2d 623, 627, 165 N.W.2d 129 (1969); *Brown v. Haertel*, 210 Wis. 345, 244 N.W. 630 (1932); *Cameron v. Union Automobile Ins.* Co., 210 Wis. 659, 246 N.W. 420, 247 N.W. 473 (1933); *Zenner v. Chicago, St. P., M. & O. R. Co.*, 219 Wis. 124, 262 N.W. 581 (1935); *Gauthier v. Carbonneau*, 226 Wis. 527, 277 N.W. 135 (1938).

Wis. 558, 34 N.W.2d 853 (1948). *Schuh, supra*, reaffirms the duty to dismiss where the particular training, status, knowledge and experience of the user requires a determination by the court that the user's negligence exceeds that of the manufacturer as a matter of law. These recent decisions are strikingly similar to the instant case.[3]

In *Schuh*, the plaintiff sought damages for the loss of a leg after it was caught in the fan of a piece of farm machinery known as a crop blower. The jury attributed 60 percent of the causal negligence to the defendant and 40 percent to the plaintiff. On motions after verdict, the trial court set the jury's verdict aside, directed a verdict in favor of the defendant, and dismissed the complaint. The Wisconsin Supreme Court affirmed, giving the same consideration and importance to the status and training of the farmer as the majority in the Court of Appeals gave to the master plumber in the case at bar. The Wisconsin Supreme Court relied upon these facts:

> "The plaintiff was a farmer and had lived on a farm practically all his life. He was familiar with farm machinery. He had worked with this same machine two- and one-half days the previous year, and a full day on the day of the incident. He knew that the crop blower was equipped with a fan capable of propelling silage through a nine-inch pipe at least far enough to reach the top of a silo. It was essential that the fan continue to operate after the auger stopped in order to clear the pipes, and no machine was manufactured by any manufacturer, in which the clutch stopped both the fan and the auger.
>
> "On at least two previous occasions on the day in question, the conveyor belt had come off the sprocket and on each occasion plaintiff disengaged the clutch lever. . . ." 63 Wis.2d at 744.

[3] None of these three cases are cited by petitioners.

The Wisconsin Supreme Court concluded, that because of his familiarity and experience with the crop blower, the farmer's negligence exceeded that of the manufacturer as a matter of law. *Id.* at 744-745.

The foregoing analysis is substantially the same as that applied by the Court of Appeals in this case. (See A-13). In concluding that the Ridgid 300 was reasonably safe for its intended use and that the negligence of the appellee was the sole cause of the accident, the Court considered the facts of this case, including the status, intelligence, and training of the user, just as the Wisconsin Supreme Court did in *Schuh*.

It is unimportant whether the reviewing authority fashions its holding on a reapportionment of the causal negligence as a matter of law, as was done in *Schuh*, or whether it dismisses the action because the alleged defect is open and obvious to a knowledgeable user and, therefore, as a matter of law the product cannot be unreasonably dangerous as in *Vincer*. The same result follows: no liability.

Vincer is the most recent expression of the Wisconsin Supreme Court concerning the effect of an open and obvious danger on the liability of a manufacturer. The court sustained a demurrer to a complaint which alleged negligence and strict liability for the defendant's failure to equip a swimming pool with a self-closing gate. The court stated:

> ". . . [T]he test in Wisconsin of whether a product contains an unreasonably dangerous defect depends upon the reasonable expectations of the ordinary consumer concerning the characteristics of this type of product. If the average consumer would reasonably anticipate the dangerous condition of the product and fully appreciate the attendant risk of injury, it would not be unreasonably dangerous and defective. This is an objective test and is not dependent upon the knowledge of the particular injured consumer,

although his knowledge may be evidence of contributory negligence under the circumstances. In *Schuh v. Fox River Tractor Co.* for example, the court held that the positioning of the clutch lever on a crop blower machine constituted an unreasonably dangerous defect because a potential user might be misled as to its function. However, the court held the particular injured plaintiff's contributory negligence greater than any negligence of the manufacturer because the plaintiff was an experienced operator of the machine and knew of the potential dangers, yet failed to exercise due care.

"Based upon the principles discussed above, we conclude that the swimming pool described in plaintiffs' complaint does not contain an unreasonably dangerous defect. The lack of a self-latching gate certainly falls within the category of an obvious rather than a latent condition. Equally important, the average consumer would be completely aware of the risk of harm to small children due to this condition, when the retractable ladder is left in a down position and the children are left unsupervised. We conclude, therefore, that plaintiffs' second amended complaint fails to state a cause of action." 69 Wis.2d at 332-333.

The Court of Appeals reached the same conclusion for substantially the same reasons. It said:

> ". . . we are of the opinion that the question of whether a danger is open and obvious to a user of a particular instrumentality is not a matter which should be determined in a vacuum. Rather, the unique facts of each case should bear on the question, and thus, in our opinion, includes the status, intelligence, and more importantly, the training of the particular user involved.
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> "Accordingly, since we find that the Rigid 300 was reasonably safe for its intended use, taking into account

the training and experience of the persons for whose use the machine was intended, and that appellee's negligence was the sole cause of the injuries sustained, we find error in the verdict in the court below." App. A-12-A-14.

It is interesting to note that dissenting Wisconsin Justices Wilkie and Heffernan had the same problem with the majority decision in *Vincer* that dissenting Judge Campbell had with the majority decision in the instant case. In noting his dissent in *Vincer*, Chief Justice Wilkie stated:

"The first problem I find in the majority opinion is that it holds that there was no defect here as a matter of law. I would hold that this was a factual determination to be tried out by the trier of fact. There is a question here for the trier to determine whether the swimming pool (which did not have a self-latching and closing gate) was unavoidably unsafe as, for example, knives, baseball bats, alcohol, small foreign cars, and, therefore, not defective. Then, too, it would be a question of fact whether rendering the product safe by incorporating other safety features would destroy the usefulness of the product, or would be far too costly. On this the defective swimming pool manufacturer would have the burden of proof.

"The additional *holding of the majority ruling out liability where the defect is obvious and apparent*—as here—is really based upon the concept of assumption of risk which *Dippel, supra,* held was not an absolute bar to recovery but rather a matter of contributory negligence . . .

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"Thus, I would conclude that the obviousness of a defect is not a total bar to recovery, but merely a matter pertaining to contributory negligence." 69 Wis.2d at 333-336. [Emphasis supplied.]

This is the substance of the argument made by the petitioners. This argument was rejected by the majority of the Wisconsin Supreme Court in *Vincer*. The Wisconsin law was not misunderstood, but accurately applied by the majority in the instant case.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted

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